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ABSTRACT

A summary is presented of some of the ways that judicial decisions and laws have an impact on higher education and on public education. The sources of legal obligation that impose duties and responsibilities on teachers are discussed. These are: common law, contractual obligations, state laws, and federal laws. The legal definitions are given of liability, negligence, informed consent, injunctive relief, tort liability, and strict tort. In a discussion of educational malpractice, several court decisions are cited to illustrate the legal interpretation of the term. The legal ramifications of Public Law 94-142, Education for the Handicapped Act, are examined. The rights of students to free association and privacy are considered as they affect the rights and obligations of an educational institution and faculty. (JD)

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INSTRUCTIONAL LIABILITY IN PHYSICAL EDUCATION TEACHER EDUCATION

Speech Presented By

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December 5, 1980
At
Ohio Association of Health,
Physical Education and Recreation

There are several sources of legal obligation that impose duties on us as teachers. These sources are generally one of following four places: the common law, contractual obligations that we might have, state laws and the state constitution, and federal law. Interestingly enough the federal constitution says absolutely nothing about education, so historically education has been a state responsibility. Therefore, each state constitution has some article about education and, thus, each state may be a little different in its approach to the obligations relating to education. Let us examine these sources of obligations in order.

First, common law has evolved through a whole series of court decisions. These court decisions look at one's relationship to another person, and obligations or duties have been determined based on these kinds of relationships. For example, as a parent I have certain responsibilities to my children. If I were walking along side a river and happened to see one of my children in danger of drowning, I have an obligation to try and save their lives because of my relationship to them. On the other hand, if one of you, a stranger, happen to be in the same situation you have no obligation to rescue my child nor do I have any obligation to attempt to rescue you. These kinds of duties have evolved over the years through a series of court decisions in England and the United States. We find that we have certain responsibilities to keep others free from injury caused by our negligence along with other similar responsibilities that have been developed through these decisions.

The second series of obligations arise from contractual obligations. Whenever you sign a contract, certain kinds of obligations that will be specified, some in great detail, some in very little detail. If you have an academic contract that reads like mine it says something like this, "Services of the members of the university faculty shall be rendered in accordance with pertinent provisions of the Ohio Revised Code, the by-laws and the established policies of the university board of trustees, the rules for the university faculty, and

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other such special conditions, if any, specifically set forth below."[1] That means when I sign my contract that I agree to abide by the Ohio Revised Code, the by-laws, and rules of The University of Toledo, whether or not I have read them. So all of those things that are in these documents become a part of my obligation because I signed this contract. How many have you read your contract to see what obligations you have acquired?

State laws have a whole series of obligations that are imposed on us. For example, the child abuse statute[2] is one of these. How many people realize that if they are a professional--that is a teacher, physician, nurse, attorney, social worker, or anybody associated with these and a related professions--and if you have suspicion that child abuse is occurring you have a legal duty to report it. If you don't report your suspicions you could be found violating a legal duty. Furthermore, the people to whom you report it to have a legal duty to keep it confidential. They can't tell anyone who reported it; if they do they are liable for criminal action. There are a whole series of state laws such as this which impose duties upon us whether or not we are aware of the laws.

Federal legislation has become more and more important in its impact on education. For example, the privacy act[3] which deals with the confidentiality of records gives duties we are all responsible for following. You see some of the effects of this act in university placement services, where they ask students to check off and give up their right of being able to read recommendations. Further all faculty are responsible to protect all records of any students from being viewed by someone else. So when you pass out tests it is not proper if you pass out tests so somebody can see the grade that any other individual has received. You are abusing this act when you post letters, or grades on doors or display any kind of record that is supposed to be kept confidential.

How do we know that we are responsible for these procedures? The U.S. government has a publication called the Federal Register which is published everyday. As soon as Congress passes one of these acts it is published in the Federal Register. As soon as it is published in the Federal Register, you are considered to have knowledge of it. Whether or not you read it, upon publication it is within the realm of your knowledge and you are accountable for it. We are helped with this because the Department of HEW sends information to the superintendents, state school superintendents, or the university presidents. It is then their responsibility to inform us. So these are the sources of obligations that we have: common law, contractual obligations, state laws, and federal laws.

I would like to spend just a little bit of time talking about breaches of these obligations. When we think about breaches of obligations we immediately think about law suits, but there are many other ways that can be used to enforce duties. For example, if the federal government passes a law and they are funding your agency, university or school district, one of the ways that they have at their disposal to enforce this law is simply to remove all federal funds. Now I think its very hard very difficult today to locate an agency or government unit or school that doesn't receive some federal funding. Even loans to students attending universities are considered to be federal funding. So the withholding of funds is really the quite a stick that the federal government can use to make one comply with legislation.

Injunctive relief is another form of enforcement. An injunction is a court order. A person who seeks an injunction goes down to court and asks for an order which will either stop somebody or agency from doing a certain thing or will cause them do to a certain thing. If the school owes you a salary and they're not going to pay it, you can go down and get injunctive relief and ask that it be paid. If somebody is going to chop down a tree on your premises you can go down and get an injunctive relief and ask that it be prohibited. This is used all the time today. It is a typical strategy used on someone trying to build a new building or do something that somebody else doesn't want. The opposing party will go down and get an injunction. They can delay progress and, finally, if you dc enough the cost can get high enough that is no longer feasible to build. This is standard type of tool that some of the environmentalists use to block certain types of construction to which they are opposed.

The enforcement that most of us hear about is tort liability. Tort liability is a law suit for breach of a duty. Here one can receive a monetary award for damages that have occurred. If the breach is flagrant the court can give a monetary award as a punitive damage for punishment in addition to monetary damage caused. Most of this court action is for damage produced by somebody through negligence resulting in tort liability.

More recently in certain other fields malpractice has become an area of great concern. When you take an action for malpractice you are saying that somebody has failed to perform a service at a level that society says is acceptable. So this is alsoa breach of duty and in the past this action has been primarily used with architects, lawyers, and physicians. However, these days the courts are seeing a whole series of educational malpractice cases. We will talk about that a bit later, but malpractice is another kind of enforcement that could be used.

When dealing with athletic products, or a manufacturer, distributor or retailor, you sometimes become concerned about product liability. Product liability is not usually directed toward the teacher, but rather product liability is directed toward the manufacturer. To get product liability all someone has to do is show that the manufacturer did not use due care in the manufacturing or distribution of the product, or there is a defect in the design that caused damage. One need not show that it is wrong, but only that it could be done better and safer and the manufacturer should have taken into account the increased safety of the product.

Strict tort is another remedy that is available. In strict tort all you have to prove that there is a defect in the design of a product or a service. Once you prove that, the person is automatically liable for damages. Now this hasn't been used at all in education although we do provide a service. The way the people have attempted to get relief with education cases is through malpractice or injunctive relief or negligence. However, I am involved as a witness right now where a person provided a service producing an injury. A defective service was alleged and strict tort is what they are trying to prove, saying that the person didn't provide a professionally designed service. So, they do use strict tort for services also. It produces liability for the manufacturer or the provider. Some authorities suggest teachers might be liable in strict tort, too, if they know of a defect or a danger in the product and select the product anyway. Teachers could thus be liable when they know of the defect or the danger and they fail to warn, instruct or otherwise use due care with that product.

I've talked about liability, so exactly what is liability? Simply, liability is a breach of duty. As I've suggested here, liability is usually concerned with a breach of duty through negligence. A lawyer would look for four things when trying to determine if liability occurred. First, is there a duty? In education we have a duty to exercise due care for students and protect them from unreasonable harm and danger. Secondly, is there a breach of duty? Did somebody do something that they should not have done or did they fail to do something that they should have done? Third, there must be an injury. If there is no injury or harm, there is no liability. The fourth thing is what attorneys call proximate cause. That is, the injury has to be produced by the breach of the duty. If the injury occurred and was not caused by the breach of duty but by some other cause then there is no liability. Those are the four elements that any attorney looks for when trying to determine if there is liability.

Well, since we are talking about negligence, exactly what is negligence? Negligence defined by the court is that conduct which falls below a standard of care; a standard of care established by law to protect others against unreasonable risk of harm. It may be either acts, things that you do, or may be omissions, things that you failed to do. Your duty, then, is to protect others from unreasonable physical or mental harm and to avoid any acts or omissions that might produce such harm. It may be that this day could be modified by consent.

In this context consent means informed consent which involves two elements. First, a person must know what it is they are getting into and all the risks involved. That means that they have to be of such age or mentality that they are judged able to understand and to know what is going on. The second element involved is that participation has to be voluntary. There must be no coercion, no force whatsoever which causes them to do this act. If an adult or an older child partakes in an activity knowing that there is danger in the activity, say football; knowing that there is risk of knee injury or other kinds of injury, and the coach or the school does not force them to participate, then they may accept or assume some of the risk involved. So, there are modifications to a duty that can occur through consent, but the key is that it has to be both knowing and voluntary. If the threat of a grade is held over somebody, for example, and is used to get them to do participate, then such participation is not considered voluntary. Graduation requirements where only one course meets the requirement producing participation is not considered to be voluntary.

How do we know what our duty is? The attorney has a handy guide that he uses. He can go look at Restatement of Torts (2d) which will tell him exactly what your duty is. For example, negligent conduct is defined as an act or failure to act. Negligent conduct may be "an act which the actor as a reasonable manner should recognize as involving unreasonable risk of causing an invasion of an interest of another, or as a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do."[4] That is, the standard for negligence looks at the reasonable man. It asks the question, what would the reasonable man, or reasonable person, have done in a similar situation? However, this reasonable person never has any lapse of memory and doesn't make mistakes. Professionals are judged just a little bit differently. If we look at the duty that is imposed on someone who is in a profession or trade, we find that the standards is like this. "Unless he represents that he has greater or less skill or knowledge, one who undertakes to

render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."[5] Therefore, what they look at is how you with your Ph.D. degree performed relative to what other Ph.D.'s would do. Or, if you as a student teacher have a problem, how you as a student teacher performed relative to what other student teachers would do. The standard is always used to compare what you and others in similar status in that profession or trade would do in the same or similar situation.

There have been a couple of interesting exceptions to this. For example, there was a biology professor who was drawing blood in laboratory classes to look at blood count and blood typing. He had a problem in his class as one of the times when he was drawing blood he apparently perforated the vein and a hematoma or an infection developed. When the case came to court, the court found that professor negligent and the standard of the care that they used was the standard of care for a physician because he was performing a medical type of act. Since he was undertaking a task normally performed by the medical community he was, therefore, held accountable to the standard of a medical person.[6] Consequently, if you began to dabble in other professions you may be held accountable to the standard of care of that profession instead of the standard applied to physical education. That is really a sobering thought sometimes, isn't it? Look at athletic training and all the kinds of things that you could do in athletic training. Look at first aid care.

One of the things we're concerned about in the university is academic freedom. I think it's important to consider for a minute, the definition of academic freedom.[7] It is the liberty and obligation to study, to investigate, to present and interpret, and to discuss facts and ideas concerning all branches and fields of learning. Academic freedom also involved a duty to teach and give proper instruction using such techniques in which the instructor is effective and successful in covering the desired curriculum. But there are limitations to academic freedom. If we look at the policy guide of the American Civil Liberties Union[8] academic freedom is not academic license; its scope is limited by generally accepted standards of responsible scholarship. This means a professor must follow the standards of the profession. The Bulletin of the American Association of University Professors[9] describes it this way. The teacher is entitled to freedom in the classroom to discuss his subject, but he should be careful not to introduce subject matter which has no relation to his subject. So the universities and the public schools can prescribe what is to be included in the course content and curriculum. It is the obligation of the professor or the teacher to include such material and the academic freedom enables the use of methods that are acceptable, but they can't go outside the subject matter without violating the premise of academic freedom. This is a little bit different from the concept of academic freedom that was developed in Germany where the people had the freedom to talk about anything. One other factor, the contract you sign, can limit your academic freedom. If you sign a contract that incorporates university by-laws and other documents that limit academic freedom, then you have agreed to limitations on your academic freedom. As mentioned earlier, it is important to read the documents that you sign and to understand what it is you are agreeing to do.

Now for a look at what is being termed educational malpractice. The question here is, is there a cause of action for the failure to teach? What

happens if a student doesn't learn like they're supposed to? If we look at competency based instruction and competency tests at the end of instruction then this action may become more credible. If somebody passes through a course of study or curriculum and they fail to pass a competency test, then they may be back in court trying to get a relief through a malpractice suit. There are a whole series of cases that have look at this problem.

Peter Doe v. San Francisco Unified School District[10] was a public school case, and a rather sad one, where a student was misclassified by his IQ testing. The parents talked to the school officials all along the way about Peter's problems saying that they were concerned. He finally graduated with less than 5th grade ability in reading performance. Subsequently they brought a suit against the district claiming educational malpractice or failure to teach.

Another case was Ianiello v. University of Bridgeport.[11] This was a higher education case where a student was required to take a course in audiovisual materials. Apparently, all the student learned to do was put slides in a projector and to turn the overhead projector on and off. That was not what the catalogue description said the course included. Therefore, even though the student got an "A" in the course, she had been cheated and she wanted money damages for failure to teach what the catalogue said would be taught.

There are also a couple New York cases, Hoffman v. Board of Education[12] and Donohue v. Copiague Unified Free School District,[13] concerned with education malpractice in public schools by failure to take into account the characteristics of the student and to provide for adequate instruction. The failure in one case occurred when a child of normal or above normal IQ did not complete school with the 12th grade equivalent. The other cases involved a student who needed vocational and other help that was not provided for him. In all the cases so far, they have failed in the courts as educational malpractice has not been found. The reasons being that learning depends more than upon the teacher, that the student's family and other significant people have some input or effect upon what or how the student learns. Now, after saying this, there are three road blocks to keep in mind.

I suggest that this reluctance of courts to find educational malpractice may change, at least in some circumstances. First, prior cases have indicated that the person who is complaining must exhaust the administrative process before going to court. This means they must ask for hearings in the schools and must attempt to get changes done through the administration process before they go to court. The second thing courts have indicated is that there has been no precise standard of care or standard of duty prescribed for the schools or universities. Courts require some kind of standard duty the schools must follow before they will act. Third, courts have said that they will not examine educational policies, but they will review day to day implementation of these policies and intervene in gross violations of defined public policies. So if a person could show some standard of care, that the schools violated a public policy and if the person has gone through the administrative process, it would appear all the road blocks are gone from educational malpractice.

One further note. All of these cases involved circumstances occurring before Public Law 94-142 was implemented. Now what does Public Law 94-142, Education for the Handicapped Act indicate? Public Law 94-142,[14] Education for

the Handicapped Act, indicates, among other things: all students are entitled to a free appropriate public education; sceond all students are to have an individual multi-faceted evaluation; they are to have an individualized educational program developed from this testing and evaluation; it prescribes regular periods of re-evaluation; and it requires outlines of what is going to be taught with objectives. Each child must be placed in the least restrictive environment. Educators talk about mainstreaming, but the law doesn't mention the word mainstreaming. It requires that each child be handled individually. That's an important concept to keep in mind when considering the possiblity of educational malpractice. Malpractice could be viewed as the failure to handle each child individually, the failure to provide individualized educational programs, the failure to review and retest and replan their program and failure to follow the series of procedural safeguards. Examples of these include such items as follow. If you are going to evaluate or retest you must request permission from the parents. Once you have completed testing you have to give the parents notice if you are going to place the child in a program and ask for a meeting with the parents. The parents must then approve of the program placement. The parents have the right to bring to this meeting anybody that they want such as a lawyer, a counselor or friend to assist them. If they are not satisfied with that meeting then they can have a review before a impartial reviewing officer from the school. If that review doesn't work they can get an impartial review from the school district. If that doesn't work they can get an impartial review from the state superintendent's office. Finally, if none of those reviews are satisfactory, they can sue in the federal district court of the county in which the school is located. So there are a whole series of procedural safeguards that are built into law. Now let us return to the earlier objections raised by the courts. This law provides a standard of care, doesn't it? Now there is a duty with standards and objectives. There is an administrative procedure to to follow, at least for handicapped. According to the earlier cases, what else is left as a roadblock before the courts will begin to look at educational malpractice? Unless courts raise some other issues, the roadblocks to educational malpractice have been removed.

Perhaps even more widespread and more effective than PL 94-142 especially for higher education, is Section 504 of the Rehabilitation Act of 1973.[15] Section 504 of the Rehabilitation Act says "...no otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." It's difficult to find a program that isn't included under this Act. What are the problems that arise here? One of the things that arise is the question, What constitutes an otherwise qualified handicapped individual? Suppose someone who is quadriplegic, confined to a wheelchair, wants to become a physical educator. Can he do it? The leading case addressing this issue came down from the Supreme Court in 1979 as Southeastern Community College v. Francis B. Davis.[16] Ms. Davis was a licensed practical nurse with one handicapping condition, she was deaf. Using a hearing aid she could hear noise but she could not discern voice or make out spoken words; she could hear just noise. She wanted to become a registered nurse and applied for entry to the program in nursing at Southeastern Community College. The case went through the whole series of courts. The lower courts said she was not otherwise a qualified person. Then the court of appeals said yes, she was an otherwise qualified person. Finally the U.S. Supreme Court rules that because of her disability she was not an otherwise qualified person.

This ruling stated that you were not required to accept everybody into programs, only otherwise qualified individuals. Why was she not an otherwise qualified individual?

First she asked for extensive modifications in the nursing program and to be excused from a number of courses. Some modification in a program is required by Section 504, but not complete or extensive modification of the program. Secondly when working in the operating room, which is one of the nurse's duties, the nurse must respond to verbal commands from the doctor instantaneously. She could lip read but in the operating room the doctor's face is covered with a mask which would eliminate any ability she had to speech read or lip read. Therefore, she couldn't perform one of the major tasks required of nurses, which is to assist in an operating room. The other concern of the court was that she would be a danger to patients in the ward. If her back was turned to them she could not tell if they called to her because she could not pick up speech from other noise. This would be a danger and a hazard to other people who depend upon her. In fact, the court went on to say that after looking at her qualifications and requirements of a licensed practical nurse, she should probably not have been accepted into that program. So there are limits to what university programs and other programs must do to accommodate people who may not be able to perform as an otherwise qualified individual. It is my suspicion that we will hear a lot more about this category in other university programs as time goes on.

Well I could summarize this talk and say that there are series of different rights that have evolved. Perhaps the best approach is to summarize very briefly the rights of students followed by the rights of the faculty. Students have the right of association. This right is pretty well defined, especially through the cases involving students for democratic action trying to organize chapters on university campuses.[17] Certain restrictions are placed upon the students' right to associate, but as a general rule they have the right to associate. The right of freedom of expression has been pretty well defined, too. Civil rights expansion during the 50's, 60's and 70's have delimited this right. The Tinker v. Des Moines case[18] where students were allowed to wear black arm bands in school is an example of freedom of expression. Other cases included all kinds of dress and hair codes.[19] Now this right is pretty well defined. Another right that is now codified, as opposed to those which come down through the Supreme Court decisions, is the right to privacy. The Privacy Act[20] now specifies what can be and what can't be done with records. Many of the current laws include administrative due process. Due process is always required; from the paddling issue of Ingraham v. Wright[21] through the PL 94-142 procedures. Students, or their parents, are entitled to know the charges against them, to be able to confront the witnesses, and to be able to rebutt. In fact, some of the cases indicate that education is a property right[22] and the schools can't arbitrarily suspend students. There is some suggestion that the 10 day suspension is about a maximum allowed, so due process has really been extended during the 60s and 70s. Lastly, I will leave a question. What about competent instruction? Do students have a right to competent instruction? Apparently now handicapped students do. If this is true, it follows then that some day the normal students will also have a right to competent instruction. However, there is an Iowa case where a gifted child was trying to get adaptation of a curriculum to meet his needs.[23] The courts read the laws as saying all the child was entitled to was a basic education. Gifted children don't have the right to education other than

the basics and, therefore, he's only entitled to get what everybody else gets. An interesting question isn't it, do you have a right to competent instruction? What is competent instruction?

Let us look at the rights of the faculty. Choice of curriculum is generally one, except in public schools where usually the right to choose a curriculum is covered by state law which prescribed that certain people on the state superintendent level or local level can choose the curriculum.[24] A choice of methods in instruction is usually a right of the faculty member but can not be used as a defense against incompetence.[25] But recall we talked about academic freedom and indicated that it imposes some limits on choice of method. One has a duty to instruct in a professionally acceptable manner and you a faculty member can only cover in class the subject matter which is germain to the subject. One can't discuss all kinds of extraneous information. It may further be that you give up some of your rights in choice of methods of teaching or curriculum through the contract obligations that you incure, so those rights can be modified. Freedom of speech is a right, but there are two different levels of freedom of speech. One relates to the classroom as academic freedom places limits on what you can talk about. The Tinker Case indicates that you can have freedom of expression as long as you are not going to disrupt the classroom, so it may be OK for an instructor to wear a black arm band. But the instructor does not have the right to go in and talk about some kind of cause outside the subject matter in the classroom with freedom of speech.[26]

However, outside the classroom teachers are generally the subject to the same limitations of other private citizens.[27] Teachers can do just about anything they want as a private citizen; they can come and talk against the school board in a board meeting.[28] Those rights are pretty well defined, but there are a couple of exceptions to this freedom of speech outside the classroom. One exception was indicated in a homosexual case[29] involving a practicing homosexual who a real advocate. He paraded up and down the street and bought TV time and took his cause to the community. The courts found that his outside activities had ruined his effectiveness in the classroom. Freedom of association is another right. We can associate with almost anyone or join any association. Employers can't ask you carte blanche to list all the agencies or associations that you may or may not have joined in the past 10 or 15 years.[30] We have a right to procedural fairness, too, just as the students do. Tenure laws and employment practices give us some of this right. One year contracts may not give you the same kind of procedural process that comes with tenure but, there are still some procedural rights. For example you must have notice by a certain time that you will not be renewed. If they tell you why you are not being renewed they have to be able to defend it and give you a hearing.[31] But they can terminate you for no reason at all. Finally privacy and choice of lifestyle are a right so long as there is no interference with your job performance.[32] The limits here are much like those described in the homosexual cases.

What I have tried to do with this presentation is present a brief summary of some of the ways that judicial decisions and laws have an impact in higher education and in public education, generally. I hope that this has given you some kind of knowledge about the breath that the judicial and legal is involved with in education because it is really quite broad today.

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[20]Op. cit.

[21]Ingraham v. Wright, 430 U.S. 651 (1977).

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